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Supreme Court of the United States

October Term, 1938.

No. 339

HENRY S. LONG, CHAIRMAN, AND JOHN P. KOHN, SR., AND W. W. RAMSEY, AS MEMBERS COMPRISING THE STATE TAX COMMISSION OF THE STATE OF ALABAMA, ET AL.,

Appellants,

vs.

WALTER STOKES, JR., AS COMMISSIONER OF FINANCE AND TAXATION OF THE STATE OF TENNESSEE.

BRIEF ON BEHALF OF WALTER STOKES, JR., ETC., APPELLEE.

EDWIN F. HUNT,
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BAIRD-WARD—NASHVILLE

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BRIEF ON BEHALF OF WALTER STOKES, JR., ETC., APPELLEE.

May It Please the Court:

PRELIMINARY STATEMENT.

No complete statement of the case will be made, but we shall merely correct two erroneous statements and one omission, doubtless inadvertent, which are contained in the Statement of the Case made by adversary counsel.

The brief for appellants states that the securities in question were by the terms of the decedent's will to remain in the hands of the hands of the Title Guarantee Loan & and Trust Company at Birmingham, Alabama. (Their Brief, pp. 2-3.) The greater portion of the securities were so to be held for the benefit of decedent's children, also

residents of Tennessee, but some of the securities were bequeathed absolutely to the children by Item Two, Section Three of the will. (R., p. 23.)

The brief for appellants on page 4 says: "It is admitted that at the time of the creation of the trust, and at the time of the execution of the will neither the State of Alabama nor the State of Tennessee had any form of succession tax." This is incorrect. Not only is there no such admission in the record, but the true facts are otherwise. At the time of the creation of the trust (1917) and also at the time of the execution of the will (1926) Tennessee had a succession tax, as the courts of Tennessee could judicially notice. See Chapter 174, Acts of Tennessee of 1893; Chapter 101, section 20, Public Acts of Tennessee of 1915; and Chapter 46, Public Acts of Tennessee of 1919.

The brief for appellants does not mention that under the trust instrument as amended Mrs. Scales reserved the power to encroach upon a portion of the corpus of the securities for her support and maintenance. (R., pp. 12, 16.) There is no showing that this power was ever exercised.

A statement of facts, sufficiently full to present the question raised, will also be found in the opinion of the Supreme Court of Tennessee. This opinion, not yet officially reported, is in the record, pages 49-54, and is reported in 118 S. W. (2d), 228.

THE STATUTES.

By Article XII, Chapter 2 of the General Revenue Act of the State of Alabama, there is "levied and imposed upon all net estates passing by will, devise or under the intestate laws of the State of Alabama or otherwise, which are lawfully subject to the imposition of an estate tax by the State of Alabama, a tax equal to the full amount of the tax permissible when levied by and paid to the State of Alabama as a

credit or deduction in computing any Federal estate tax payable by such estate." (R., p. 29.)

By Section 1259 of the Code of Tennessee there is imposed an inheritance tax upon "all intangible personal property" when the transfer is made by a will of a resident of Tennessee. (R., pp. 36, 51.)

THE QUESTION.

The controlling question may be stated as follows:

Where a resident of Tennessee transfers stocks and bonds in trust to a trustee domiciled in Alabama, the settlor reserving the income for life, the power to control investments, the power to appoint a substitute trustee, limited power of encroachment upon the corpus and power to dispose of the property by will, and where the settlor dies still a resident of Tennessee, disposing of such property by will, does the state of residence of the settlor or the state of residence of the trustee have the right under the Federal Constitution to impose death transfer or succession taxes? We proceed to a consideration of this question.

SUMMARY OF ARGUMENT.

I.

The general rule is that the situs of intangible personal property for the purpose of death transfer or succession taxes is the domicile of the decedent at death. (Hereinafter discussed at page 8.)

Bullen v. *Wisconsin* (1916), 240 U. S., 625; 60 L. Ed., 830;

Blodgett v. *Silberman* (1928), 277 U. S., 1; 72 L. Ed., 749;

First National Bank of Boston v. *Maine* (1932), 284 U. S., 312; 76 L. Ed., 313.

II.

So firmly established is this general rule that in every case presented to this Court since its announcement of the principle of immunity from taxation by more than one state, the claim of a state other than the domicile to levy a succession tax upon intangibles has been rejected. (Hereinafter discussed at page 9.)

Farmers Loan & Trust Co. v. *Minnesota* (1930), 280 U. S., 204; 74 L. Ed., 371;
Baldwin v. *Missouri* (1930), 281 U. S., 586; 74 L. Ed., 1056;
Beidler v. *South Carolina* (1930), 282 U. S., 1; 75 L. Ed., 131;
First National Bank of Boston v. *Maine* (1932), 284 U. S., 312; 76 L. Ed., 313.

III.

The testamentary transfer in controversy was not of an interest in a trust or of the corpus of a trust, but was a transfer of stocks and bonds which once had been held in a trust. (Hereinafter discussed, page 12.)

Young v. *Bradley* (1880), 101 U. S., 782; 25 L. Ed., 1044;
Winters, et al. v. *March, et al.*, 139 Tenn., 496;
Bogert Trusts and Trustees, Vol. 4, sec. 997;
Perry Trusts and Trustees, Vol. 2, sec. 920.

IV.

The only *possible* exception to the general rule with reference to the situs of intangibles for purpose of inheritance taxes relates to intangibles which have acquired a business situs at a place other than at the owner's domicile. (Hereinafter discussed, page 15.)

First National Bank of Boston v. *Maine* (1932), 284 U. S., 312; 76 L. Ed., 313;
Farmers Loan & Trust Co. v. *Minnesota* (1930), 280 U. S., 204; 74 L. Ed., 371;

Liverpool & L. & G. Ins. Co. v. *Orleans Assessors* (1911), 221 U. S., 358; 55 L. Ed., 769;

Bristol v. *Washington County* (1900), 177 U. S., 133; 44 L. Ed., 701;

New Orleans v. *Stempel* (1899), 175 U. S., 309; 44 L. Ed., 174.

V.

Intangibles acquire a business situs at a place other than at the owner's domicile when they become integral parts of some local business or there is localization for the purpose of transacting business. (Hereinafter discussed, page 18.)

People, ex rel. v. *Graves* (1937), 299 U. S., 366; 81 L. Ed., 285;

State Board of Tax Assessors v. *Comptoir National D'Escompte* (1903), 191 U. S., 388; 48 L. Ed., 232;

Westinghouse Electric & Mfg. Co. v. *Los Angeles* (1922), 188 Cal., 491; 205 Pac., 1076;

Crane Co. v. *Des Moines* (1929), 208 Iowa, 164; 225 N. W., 344; 76 A. L. R., 801;

Manufacturers Trust Co. v. *Hackett* (1934), 118 Conn., 101; 170 Atl., 792;

See also extensive annotations, 76 A. L. R., 806-829, and 79 A. L. R., 344.

VI.

Assuming for the purpose of argument that the intangibles in question acquired a situs analogous to the actual situs of tangible property and that the question heretofore expressly reserved is now presented for decision, the claim of the state of domicile, and not the claim of the state where the intangibles are kept, should be sustained with respect to succession taxes for the following reasons:

(a) The states generally have asserted the right to tax all intangibles of their residents and have not attempted to tax

intangibles of non-residents. (Hereinafter discussed, page 22.)

Blodgett v. *Silberman* (1928), 277 U. S., 1, 8; 72 L. Ed., 749, 756;
First National Bank of Boston v. *Maine* (1932), 284 U. S., 312; 76 L. Ed., 313.

(b) The decisions prior to the adoption of the rule of immunity from taxation by more than one state uniformly recognized the right of the state of domicile to tax the transfer of all intangibles, including the transfer of a trust situated in another state. (Hereinafter discussed, page 25.)

Bullen v. *Wisconsin* (1916), 240 U. S., 625; 60 L. Ed., 830;
Lines Estate (1893), 155 Pa. St., 378; 26 Atl., 728;
Countess de Noailles Estate (1912), 236 Pa., 213; 84 Atl., 665;
In Re: Fulham's Estate (1923), 96 Vt., 308; 119 Atl., 433;
Douglas County v. *Kountze* (1909), 84 Neb., 506; 121 N. W., 593;
Estate of Dillingham (1925), 196 Cal., 525;
In Re: Frazier's Estate (1912), 188 N. Y. S., 189.

(c) The decisions since the adoption of the rule of immunity from taxation by more than one state have quite generally recognized the right of the state of domicile to tax the transfer of a trust situated in another state. (Hereinafter discussed, page 28.)

Guaranty Trust Co. v. *Blodgett* (1933), 287 U. S., 509; 77 L. Ed., 463;
Blodgett v. *Guaranty Trust Co.*, 114 Conn., 207, 158 Atl., 245;
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In Re: Ellis' Estate (1932), 169 Wash., 581; 14 Pac. (2d), 37;

In Re: Estate of James Parmelee (1934), 7 Ohio Opinions, Ann., 455. (*Certiorari* denied, — U. S. —, 82 L. Ed., (adv.), 1035.

(d) In holding that only one state can levy death transfer or succession taxes with respect to intangible property, this Court was merely confining taxation to *one* state. It was not introducing a new concept as to the situs of property and was not transferring from one state which had exercised the power to another state which had not exercised the power, the right to levy such tax.

(e) The adoption of a rule adverse to the state of domicile would open the door to tax evasion, fraud and confusion among the states. (Hereinafter discussed, p. 32.)

ARGUMENT.

The situs of intangible personal property for the purpose of death transfer or succession taxes is, according to the general rule, the domicile of the decedent at his death.

In *Bullen* v. *Wisconsin*, 240 U. S., 625, this Court held that a fund represented by stocks and bonds which the decedent had conveyed upon certain trusts to a trust company of another state, reserving to himself the absolute power of control, may be subjected to an inheritance tax in the state of his domicile. With respect to the general rule this Court said:

> "As the states where the property is situated, if governed by the common law, generally recognize the law of the domicil as determining the succession, it may be said that, in a practical sense at least, the law of the domicil is needed to establish the inheritance. Therefore the inheritance may be taxed at the place of domicil, whatever the limitations of power over the specific chattels may be, as is especially plain in the case of contracts and stock."

In *Blodgett* v. *Silberman*, 277 U. S., 1, the question of the power of the state of decedent's domicile to levy an inheritance tax again arose. The decedent resided in Connecticut. A portion of his estate was stocks and bonds which were physically kept in safety deposit boxes in New York. The stocks were of corporations foreign to Connecticut. This Court sustained the power of Connecticut to impose an inheritance tax upon such intangible property.

Another question in this case was with respect to the power of Connecticut to tax the interest which the decedent had in a partnership which was engaged in business in New York. Such partnership was a very valuable business and consisted of real estate in New York and in Connecticut, of

merchandise and of other personal property. This Court held that the interest of the decedent in the partnership was intangible personal property which was subject to a succession tax at the owner's domicile. The opinion contains the following:

> "The power of the state of a man's domicil to impose a tax upon the succession to, or the transfer of, his intangible property, even when the evidences of such property are outside of the state at the time of his death, has been constantly asserted by the legislatures of the various states."
>
> . . . . . .
>
> "At common law the maxim '*mobilia sequuntur personam*' applied. There has been discussion and criticism of the application and enforcement of that maxim, but it is so fixed in the common law of this country and of England, in so far as it relates to intangible property, including choses in action, without regard to whether they are evidenced in writing or otherwise and whether the papers evidencing the same are found in the state of the domicil or elsewhere, and is so fully sustained by cases in this and other courts, that it must be treated as settled in this jurisdiction whether it approve itself to legal philosophic test or not."

Since the establishment of the principle of immunity from succession taxation by more than one state, the Supreme Court has consistently sustained the claim of the state of domicile with respect to intangibles.

The general rule that the situs of intangible property for the purpose of succession taxes is the decedent's domicile has not been departed from by this Court. In recent decisions the Court has held that two states cannot, consistently with due process of law, impose a succession tax with respect to the same property. This principle, first applied to tangible property in *Frick* v. *Pennsylvania* (1925), 268

U. S., 473, has been extended to include intangible property. The significant fact is that in the development of the rule of immunity from succession taxation by more than one state, this Court has always sustained the power of the state of domicile, as an examination of the decisions since *Blodgett* v. *Silberman, supra,* will reveal.

Farmers Loan & Trust Co. v. *Minnesota* (1930), 280 U. S., 204, was the first decision of this Court definitely holding that intangible property can be made the basis of an inheritance tax by one state only. The facts in this case were: Henry R. Taylor, domiciled in New York, died testate leaving negotiable bonds and certificates of indebtedness issued by Minnesota and her political subdivisions. Some of them were registered: The decedent's will was probated and his estate administered in New York. Minnesota attempted to assess an inheritance tax upon the transfer of the bonds and certificates mentioned.

The Court applied the maxim *"mobilia sequuntur personam"* and held that the situs for taxation was in New York. The Court conceded that *Blackstone* v. *Miller,* 188 U. S., 189, was authority in support of the claim of Minnesota, but this case was expressly overruled. It is significant that the case overruled was one permitting taxation by a state which was not the domicile of the decedent.

Baldwin v. *Missouri,* 281 U. S., 586, again applied the principle of immunity from inheritance taxation by more than one state. There a testator domiciled in Illinois at the time of her death died leaving money on deposit in banks located in Missouri and also leaving United States bonds and promissory notes physically kept within Missouri. Some of the notes executed by residents of Missouri were secured by lands in that state. The Court held that the situs of these intangibles was at the domicile of the testator and that Missouri had no power to subject them to a death transfer tax. In the opinion it was said:

"We find nothing to exempt the effort to tax the transfer of the deposits in Missouri banks from the principle applied in *Farmers Loan & T. Co.* v. *Minnesota, supra.* So far as disclosed by the record the situs of the credit was in Illinois where the depositor had her domicile. There the property interest in the credit passed under her will; and there the transfer was actually taxed. This passing was properly taxable at that place and not otherwise.

"The bonds and notes, although physically within Missouri, under our former opinions were choses in action with situs at the domicile of the creditor. At that point they too passed from the dead to the living and there this transfer was actually taxed."

Beidler v. *South Carolina Tax Comm.*, 282 U. S., 1, next applied the principle with respect to a decedent who resided in Illinois and who at the time of his death was a majority stockholder in a corporation of South Carolina, which was indebted to him in a large sum upon an open, unsecured account entered upon the books of the corporation kept in South Carolina. The Court held that this debt was taxable only by the state of the domicile and that South Carolina could not impose a succession tax upon the debt.

First National Bank of Boston v. *Maine*, 284 U. S., 312, dealt with a succession tax by a state in which a corporation was domiciled when a decedent, who was a resident of another state, died owning such stock. The Court held that with respect to such transfer the state of residence of the decedent was the only state which could impose a succession tax. In the opinion at page 330, the Court said:

"Practical considerations of wisdom, convenience and justice alike dictate the desirability of a uniform general rule confining the jurisdiction to impose death transfer taxes as to intangibles to the state of the domicile; and these considerations are greatly fortified by the fact that a large majority of the states have

adopted that rule by their reciprocal inheritance tax statutes. In some states, indeed, the rule has been declared independently of such reciprocal statutes. The requirements of due process of law accord with this view."

Thus *in every case** arising since the adoption of the rule of immunity from taxation by more than one state this Court has refused to sustain a succession tax levied on intangibles by a state other than the domicile. *In no case* has this Court ever denied to the state of domicile the power to impose a succession tax upon intangibles of a deceased resident.

The testamentary transfer in controversy was not of an interest in a trust or of the corpus of a trust but was a transfer of stocks and bonds which once had been held in a trust.

We respectfully submit there is no factor in the present case to take it out from under the general rule.

The history of the stocks and bonds prior to the creation of the trust by Mrs. Scales in 1917 cannot have anything to do with the taxable situs of the transfer at her death. At the time when Mrs. Scales created the trust in 1917 she was the absolute owner of the securities in question. Her domicile was in Tennessee and under the general maxim that "intangibles follow the person" such securities had a taxable situs only in Tennessee. The fact that during prior years these securities may have been held in certain trusts in Alabama, does not affect the fact that Mrs. Scales in 1917 owned these securities unconditionally and was a resident of Tennessee. The securities which in *Blodgett* v. *Silberman, supra,* were held taxable in Connecticut, the state of domicile, had for a long time prior to the decedent's

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*All italics in this brief are ours unless otherwise indicated.

death been kept physically in safe deposit boxes in New York and were never in Connecticut.

For Alabama it is argued that the trust now under consideration could not be removed from Alabama, the insistence being an effort to assimilate this trust to the one held exempt from *ad valorem* taxation by Virginia in *Safe Deposit & Trust Co.* v. *Virginia*, 280 U. S., 83. This argument is based only upon a statute of Alabama (R., p. 38) which empowers the circuit court to authorize the removal of a trust estate to another state.

We emphasize that the settlor reserved the right to remove the trustee and to appoint a substitute trustee. (R., p. 13.) There was no limitation upon the place of residence of such substitute trustee. We do not understand that the statute referred to has reference to a trust estate which by express contractual provision authorizes a substitution. We construe this statute as authorizing the court to permit the removal of a trust even though the trust instrument was silent. It seems clear that such statute was not intended to render invalid a contractual provision by which the settlor reserved the right to name a substitute trustee.

However, whether the statute was applicable or not, the settlor could have removed the trust from Alabama. Either she could remove it with the approval of the court or she could remove it without the necessity of such approval. We submit that the conclusion of adversary counsel is unjustified when they refer to "the impossibility of removing them or their reinvested replacements from Alabama." (Their Brief, p. 12.)

No significance can attach to the fact that Mrs. Scales in her will disposing of these securities created new testamentary trusts with reference to the greater portion of the property. Mrs. Scales had the unlimited power to dispose of the property by will. She could have bequeathed all of the property unconditionally. By Item Two, Section

Three of her will she did bequeath a portion of it unconditionally. (R., p. 23.) No provision of her will could increase or diminish the power of either Tennessee or Alabama to tax the transfer. The transfer of all the securities is taxable by Tennessee or Alabama, unaffected by the subsequent testamentary trusts created by the will of the decedent.

The issue in the present case is not as to the taxable situs of a trust fund during the lifetime of the settlor. The issue is not even as to the situs of a trust fund for taxation upon its testamentary transfer. The question is whether the power of a state of domicile to measure a transfer tax by stocks and bonds is altered or diminished by the fact that during the lifetime of the decedent such intangibles had been held in a trust in another state *which trust terminated when the decedent died testate.*

Mrs. Scales reserved to herself the absolute management of the trust fund, the power to control investments without restraint or hindrance from the trustee. (R., p. 13.) She retained the beneficial interest in the entire net income. (R., p. 11.) She reserved the power to remove the trustee and appoint a substitute trustee as often as she saw fit, *without limitation in the trust instrument as to the residence of the trustee.* (R., p. 13.) She retained a limited power of encroachment (R., p. 16) and the absolute power of testamentary disposition. (R., p. 11.)

The purpose of this trust—its whole purpose—is obvious. It was intended to preserve intact for distribution at the decedent's death a particular estate consisting of intangibles. When the decedent died testate that purpose was fulfilled. A trust ceases when the purpose for which it was created is accomplished. *Young* v. *Bradley*, 101 U. S., 782; *Winters, et al.* v. *March, et al.*, 139 Tenn., 496. As the Supreme Court of Tennessee tersely and logically said: "Mrs. Scales reserved the right, which she exercised, to dispose of all of the trust property by will. When she died

leaving a will disposing of the trust property, the situation was the same as though there had never been a trust. The property passed under the will as the absolute property of Mrs. Scales, a resident of Tennessee." (R., pp. 52-53.)

Tennessee is not seeking to impose a succession tax upon the transfer of an interest in a trust fund, but merely to tax the transfer of certain stocks and bonds passing under the will of a deceased resident of Tennessee to legatees, also residents of Tennessee. Mrs. Scales did not transfer a trust located in Alabama from herself to her legatees. What she transferred at her death was stocks and bonds which during her lifetime had been held in trust.

The only possible exception to the general rule as to the situs of intangibles for purpose of inheritance taxes relates to intangibles which have acquired a business situs.

We have heretofore quoted from the opinion in *First National Bank of Boston v. Maine*, wherein the Court announced *"the desirability of a uniform general rule confining the jurisdiction to impose death transfer taxes as to intangibles to the state of the domicile."*

To this general rule *one possible exception* was indicated. This possible exception was not announced as an actual exception but the Court merely reserved for future consideration the question of whether or not in such exceptional case the state of domicile or the state of the business situs was entitled to tax. The Court said:

> "We do not overlook the possibility that shares of stock, as well as other intangibles, may be so used in a state other than that of the owner's domicile as to give them a situs analogous to the actual situs of tangible personal property. See *Farmers' Loan & T. Co.* Case, *supra* (280 U. S., 213, 74 L. Ed., 375.")

In *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S., 204, at p. 213, the Court said:

> "*New Orleans* v. *Stempel*, 175 U. S., 309, 44 L. Ed., 174, 20 Sup. Ct. Rep., 110; *Bristol* v. *Washington County*, 177 U. S., 133, 44 L. Ed., 701, 20 Sup. Ct. Rep., 585, and *Liverpool & L. & G. Ins. Co.* v. *Board of Assessors*, 221 U. S., 346, 55 L. Ed., 762, L. R. A., 1915C, 903, 31 Sup. Ct. Rep., 550, recognize the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner *if they have become integral parts of some local business.*"

Intangibles are referred to in *Farmers Loan & Trust Co.* v. *Minnesota* as acquiring a situs for taxation other than at the domicile of their owner when they become integral parts of some local business. Let us now examine each of the cases cited in the Farmers Loan & Trust Company case as bearing upon the possible exception to the general rule.

In *New Orleans* v. *Stempel*, 175 U. S., 309, the question involved was the right of the State of Louisiana to tax certain money and credits. It appeared that the credits were evidenced by notes largely secured on mortgages on real estate in New Orleans; that these notes and mortgages were in the city of New Orleans in possession of an agent of the plaintiff who resided in New York; and that the said agent collected interest and principal as it became due and deposited the same in a bank in New Orleans to the credit of the plaintiff. The Court, holding that the credits were subject to taxation by Louisiana on the ground that they had acquired a business situs in that State, said:

> "If we look to the decisions of other states we find the frequent ruling that when an indebtedness has taken a concrete form and become evidenced by note, bill, mortgage, or other written instrument, and that written instrument evidencing the indebtedness is left within the state in the hands of an agent of the non-resident owner, to be by him used for the purposes of

collection and deposit or reinvestment within the state, its taxable situs is in the State."

In *Bristol* v. *Washington County*, 177 U. S., 133, the Court held that investments by a nonresident of the state were subject to taxation by Minnesota, when made by a resident agent who was employed to invest and reinvest moneys, at whose office the loans were made payable, and who retained the mortgages which secured them, and to whom the notes taken for the loans were returned from time to time whenever required for the purposes of renewal, collection, or foreclosure of securities, notwithstanding the fact that the notes were sent out of the state to the principal and the agent had no authority to execute satisfactions of mortgages. Mr. Chief Justice Fuller incorporated in his statement of facts the finding of the lower court which was in part as follows:

> "*Said loaning business* was so carried on by said Sophia M. Bristol by and through her said agents at the city of Stillwater, Minnesota, in the manner aforesaid until her death, in the month of August, 1894."

The Court held that the investments had acquired a business situs in Minnesota, and quoted approvingly the following from the opinion of the Minnesota Supreme Court in *Re: Jefferson*, 35 Minn., 215, 28 N. W., 256:

> "A credit, which cannot be regarded as situated in a place merely because the debtor resides there, must usually be considered as having its situs where it is owned,—at the domicil of the creditor. The creditor, however, may give it a *business situs* elsewhere; as where he places it in the hands of an agent for collection or renewal, with a view to reloaning the money and keeping it invested as a permanent business."

In *Liverpool & L. & G. Ins. Co.* v. *Board of Assessors*, 221 U. S., 346, the Court held that Louisiana could tax the amounts due a foreign insurance company by its policy-

holders in the state for premiums on which credits of thirty and sixty days had been extended. The Court, in holding that the credits had acquired a business situs in Louisiana for purposes of taxation, said:

> "We are not dealing here merely with a single credit or a series of separate credits, but with a business. The Insurance Company chose to enter into the business of lending money within the state of Louisiana, and employed a local agent to conduct that *business.*"

We respectfully submit it is perfectly clear from a review of the three cases cited in the Farmers Loan & Trust Company case, with respect to the possible exception, that when the Court referred to "a situs analogous to the actual situs of tangible personal property" the reference was to intangibles which have acquired a business situs.

Intangibles acquire a business situs when they become integral parts of some local business or there is localization for the purpose of transacting business.

The doctrine of business situs is not a new concept. It has reference, as the decisions show, to such intangible property as is localized in some independent business. One of the best definitions of business situs is contained in *State Board of Tax Assessors* v. *Comptoir National D'Escompte*, 191 U. S., 388, 403, where the holdings of this Court in earlier cases are well summarized as follows:

> "From these cases it may be taken as the settled law of this Court that there is no inhibition in the Federal Constitution against the right of the state to tax property in the shape of credits, where the same are evidenced by notes or obligations held within the state, in the hands of an agent of the owner for the purpose of collection or renewal, with a view to new loans and carrying on such transactions as a *permanent business.*"

The concept of business situs also includes intangible property which is identified with a particular place because the exercise of the right is fixed exclusively or dominantly at that place, such as a membership in the New York Stock Exchange. This was the situation dealt with in *People ex rel.* v. *Graves*, 299 U. S., 366.

In *Manufacturers Trust Company* v. *Hackett* (1934), 118 Conn., 101, 170 Atl., 792, the Court discussed quite exhaustively the subject of business situs and said among other things the following:

> "Also the property or right must be localized in some independent business so that its substantial use and value primarily attach to and become an asset of a business outside of the state of the owner's domicile and constitute, as it were, the subject matter or stock in trade of that business."

In *Westinghouse Electric & Manufacturing Company* v. *County of Los Angeles*, 188 Cal., 491, 205 Pac., 1076, the Court after stating the general rule that intangibles are taxable at the domicile of the owner, discussed the exception to this rule where intangibles have acquired a business situs and defined the phrase "business situs" as follows:

> "If we may venture to formulate a general statement of this modification of the rule, it would be that this can only result *where the possession and control of the property right has been localized in some independent business or investment away from the owner's domicile, so that its substantial use and value primarily attach to and become an asset of the outside business.* In other words, while the nonresident may own the business, the business controls and utilizes in its own operation and maintenance the credits and income thereof."

In *Crane Company* v. *City Council of City of Des Moines*, Iowa (1929), 225 N. W., 344, it appeared that the Crane

Company was a corporation organized under the laws of Illinois, with its principal place of business and home offices in the city of Chicago. It had domesticated in Iowa and maintained an agency in the city of Des Moines. The Crane Company owned the business building in Des Moines from which was distributed a line of manufactured goods. The Company was assessed for taxation on $35,000.00, which in the main represented book accounts owing the Company for goods sold from its Des Moines office. The Des Moines agency was to collect all of the accounts and remit the same promptly to the home office at Chicago and remittances were made every week covering collections so made. The Supreme Court of Iowa, although recognizing the general rule that the situs of intangible personalty for purposes of taxation is the owner's domicile, held that the book accounts had acquired a business situs in Iowa and were properly taxable there.

The Court defined business situs as follows:

> "The term 'business situs' while of modern origin, would seem to mean what the words indicate; that is, a situs in a place other than the domicile of the owner, where such owner, through an agent, manager, or the like is *conducting a business* out of which credits or open accounts grow and are used as a part of the business of the agency."

Extensive annotations with respect to the business situs for purposes of property taxation of intangibles will be found in 76 A. L. R., 806, *et seq.*, and 79 A. L. R., 344, *et seq.* An examination of these annotations will reveal in the cases no suggestion that intangibles acquire a business situs because they are conveyed in trust.

Furthermore, an important point to be emphasized is that *in order for intangibles to acquire a business situs the business must be that of the person sought to be taxed.*

This is made clear by the decision in *Beidler* v. *South Carolina Tax Commission,* 282 U. S., 1, where this Court refused to permit South Carolina to levy an inheritance tax upon the indebtedness of a corporation to a nonresident majority stockholder. It was argued that the sum advanced to the corporation was used in business in South Carolina and had acquired a business situs in that state, but the Court pointed out that such business as was carried on in South Carolina was not the business of the decedent but the business of the borrowing corporation. In the opinion, it is said:

> "It is sought to sustain the tax by South Carolina upon the ground that the indebtedness had what is called a 'business situs' in that state and the state court adverted to this basis for the tax.
>
> . . . . . .
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> "That the decedent was largely interested in the affairs of the corporation is apparent; he owned a majority of its stock, but nothing is shown which derogates from its existence as a corporation, transacting its business as such, with corresponding corporate rights and liabilities. The interest of the decedent as a stockholder was a distinct interest, and the estate of the decedent has been taxed by South Carolina upon the transfer of his stock according to its agreed value. With respect to the items of indebtedness of the corporation to the decedent, the latter appears upon the record simply as a creditor, with his domicile in Illinois."

The fact that the trustee as a separate legal person is carrying on its business in Alabama has nothing to do with the situs for inheritance tax purposes of a transfer by the decedent of her interest in certain securities. Mrs. Scales did not send securities into Alabama as an integral part of a business carried on by her there.

The question heretofore expressly reserved in First National Bank of Boston v. Maine need not be decided in the present case but if decided ought to be resolved in favor of the state of domicile.

This Court has expressly reserved the question of the jurisdiction of the state of "business situs" to impose a succession tax upon intangible personal property of a nonresident. *First National Bank of Boston* v. *Maine*, 284 U. S., 312, at 331. We believe that the facts of the present case do not require a determination of the question heretofore reserved. However, we desire now to present certain arguments in support of the claim of the state of domicile, assuming for the purpose of argument that the intangibles in question acquired a situs analogous to the actual situs of tangible property and that the question heretofore reserved is now necessary for decision.

The states generally have asserted the right to tax all intangibles of residents and have not attempted to tax intangibles of nonresidents.

In *Blodgett* v. *Silberman*, 277 U. S., 1, at 8, this Court pointed out that the power of the state of domicile to tax the transfer of intangibles "has been consistently asserted by the legislatures of the various states."

In *First National Bank of Boston* v. *Maine*, 284 U. S., 312, at 331, the Court said that the practical considerations dictating the desirability of a uniform general rule confining the jurisdiction to impose succession taxes as to intangibles to the state of domicile "are greatly fortified by the fact that a large majority of the states have adopted that rule by their reciprocal inheritance tax statutes."

The language of these decisions led us to investigate the statutes of all the states and the conclusions expressed in the succeeding paragraphs are based upon an actual examination of every such state statute. An effort was made in

all cases to find the latest statute of the state but we do not vouch for the entire accuracy of the statements made in view of the possibility of legislation in a state subsequent to the compilation of statutes examined. We do vouch for the general accuracy of the statements as presenting a fair picture of the whole situation.

No state which has an inheritance or succession tax has ever purported to surrender the power to tax intangibles of its own residents. No state has ever exempted from succession tax the intangibles of its own residents upon the theory that they may have acquired a business situs elsewhere.

Six states have succession tax statutes which make no effort under any circumstances to tax intangible property of nonresidents. These six states are Tennessee, Connecticut, Delaware, Massachusetts, New Jersey, and Virginia.

Twenty-one states have reciprocal exemption provisions. These provisions assert the power of the state of domicile to tax all intangibles. These reciprocal provisions surrender the power to tax intangible property of nonresidents even though it is claimed to have acquired a situs within the state, provided the state in which such nonresident resided does not endeavor to collect a tax from a resident of the reciprocal state with respect to his intangibles.

The language of many of the reciprocal provisions is identical although some of them are differently worded. As this Court said in *First National Bank of Boston* v. *Maine*, 284 U. S., at 327, the reciprocal inheritance tax statutes "make no distinction between the various classes of intangible personal property."

The twenty-one states which have reciprocal provisions are California, Florida, Idaho, Indiana, Iowa, Maine, Maryland, Michigan, Mississippi, Missouri, New Mexico, New York, North Dakota, Oregon, Pennsylvania, South Carolina,

Texas, Washington, West Virginia, Wisconsin, and Wyoming.

Nebraska has a reciprocal provision limited to stocks.

Five states have statutes which purport to reach intangible personal property having a business situs within the state. These states are Arkansas, Kentucky, North Carolina, Ohio, and Oklahoma. In addition, Colorado taxes intangibles having a business situs, provided the state of domicile did not tax.

Seven states have statutes which, with respect to nonresidents, tax "property" within the state or the jurisdiction of the state. These states are Arizona, Kansas, Louisiana, Minnesota, Montana, South Dakota, and Utah. It is obvious that these statutes are susceptible of a construction which would tax all intangibles of residents or intangibles of nonresidents having a business situs, the construction to depend upon the ultimate decision of the reserved question.

The remaining states either have no succession tax or the statutes are sufficiently peculiar to prevent general classification.

We submit that the above survey reveals just what havoc would be wrought in the field of taxation if the contention of the appellants was sustained. The vast majority of state statutes would be held, to some extent at least, to be unconstitutional. The only states left with adequate taxing statutes would be those which have either purported to tax all intangibles of residents and also intangibles of nonresidents having a business situs, or those few states which merely tax property within the jurisdiction. We think it evident that these were some of the considerations which this Court had in mind in *Blodgett* v. *Silberman*, 277 U. S., 9-10, when the Court pointed out that whether the maxim *"mobilia sequuntur personam"* is approved when submitted to legal philosophic test or not, it is fixed in the common

law of this country and of England and "*must be treated as settled in this jurisdiction.*"

The decisions prior to the "one state" rule uniformly recognized the right of the state of domicile to tax the transfer of all intangibles.

Every case which we have found decided prior to the adoption of the rule of immunity from taxation by more than one state sustains our contention that the transfer is taxable in Tennessee, the state of domicile. We have heretofore explained our view that the present transfer was one of stocks and bonds and was not a transfer of an interest in a trust. Even if there were a transfer of an interest in a trust then the subject matter of the transfer was intangible personal property which under the decisions is taxable at the domicile.

Bullen v. *Wisconsin, supra,* has heretofore been discussed (*Ante,* p. 8). Our adversaries can avoid this decision only by the argument that it has now been discarded because of the "one state rule." In several of the cases limiting the power to tax to one state, *Bullen* v. *Wisconsin* has been cited approvingly. The cases which have been disapproved were cases where a state other than the domicile had been permitted to tax.

Lines Estate (1893), 155 Pa. St., 378, 26 Atl., 728, illustrates the rule prior to *First National Bank of Boston* v. *Maine.* This case holds that where a resident of Pennsylvania transferred securities to a New York corporation as trustee, the trustor reserving the life income and the power of revocation but providing that if the trust was not revoked the securities should be transferred at the death of the trustor to certain designated beneficiaries, there was a transfer taxable in Pennsylvania when the trustor died there. The Court said:

"In view of the undisputed facts, it is strange that any question should have been seriously raised either as to the right of the commonwealth to the tax on the securities or the liability of the beneficiaries to pay their respective proportions thereof. Mr. Lines was not only the beneficial owner of the securities prior to and at the time of his decease, but, under the reserved power of modification, revocation, etc., he had absolute control of the disposition to be made of the securities upon his decease. At any time prior thereto, he could have modified or revoked the trust in favor of the beneficiaries named in the deed. It is true the legal title to the securities was in the trust company; but aside from mere compensation for its services, as custodian of the property, the company had no beneficial interest therein. In any proper sense of the term, the securities were the 'personal property' of Mr. Lines."

In *Countess de Noailles Estate* (1912), 236 Pa., 313, 84 Atl., 665, there was presented the converse situation to that found in the *Lines Estate* case. A person died domiciled in France and leaving securities held by a trustee in Pennsylvania under a trust giving the decedent absolute right of disposition. Although Pennsylvania was the state of residence of the trustee, the Court held that Pennsylvania was without power to tax these intangibles which followed the person of the owner who was domiciled elsewhere.

Douglas County v. *Kountze* (1909), 84 Neb., 506, 121 N. W., 593, deals with a trust made by a settlor residing in Nebraska who conveyed certain stocks to a trustee residing in New York and delivered the manual possession of such stocks to the trustee. The settlor in the trust deed designated the beneficiaries of the trust estate before his death but reserved the right by his will otherwise to dispose of the property. In his will the settlor disposed of the trust property which was held taxable in Nebraska, the state of domicile. The Court said:

"The record does not disclose whether Herman Kountze made a will or not. If he did and therein exercised the right which he reserved in the deed of settlement, then said beneficiaries must trace their succession through said will and by grace of the laws of Nebraska, and that devolution is subject to the inheritance tax."

Estate of Dillingham (1925), 196 Cal., 525, presents a situation substantially identical with the facts of the present case. A resident of California created a trust, the corpus of which consisted of shares of stock. Under the trust instrument the certificates of stock were turned over to a trustee in another state who was to remit the net income to the settlor during her lifetime. Upon the death of the settlor the trust terminated and the property was to be distributed by the executor of the estate of the settlor. The settlor died a resident of California and left a will by which she disposed of such stock. This was held to be a transfer taxable within California. The Court said:

"The theory upon which the inheritance tax is imposed and sustained is that the state which confers the privilege of succeeding to property may attach thereto the condition that a portion of the property shall be contributed to that state. . . .

"There can be no question in the instant case but that the transfer was accomplished through the third codicil to the testatrix's last will and testament. . . . There can be no question, it seems to us, therefore, but that the transfer of the property was accomplished by the will, the efficacy of which depended upon the authority of the state of California. In the ultimate analysis a necessary incident to the transfer of the interest depended for its efficacy upon the laws of the state of California, and was for that reason liable for the imposition by the state of a tax upon said transfer."

Decisions since the adoption of the rule of immunity from taxation by more than one state have generally recognized the right of the domicile to tax the transfer of a trust situated in another state.

In support of our contention that this Court ought to resolve the reserved question in favor of the state of domicile, let us now examine certain decisions since the announcement of the rule that only one state can levy a succession tax on intangibles. A consideration of these cases will reveal the presently accepted concept as to situs.

Guaranty Trust Co. v. *Blodgett*, 287 U. S., 509, sustained a succession tax levied by Connecticut on the transfer of stocks and bonds by an irrevocable trust deed, although the trust deed was executed in New York, the trustee was a resident of New York and the securities were kept in New York. The decedent was a resident of Connecticut.

It is true that in the opinion of this Court the business situs doctrine is not mentioned. The significant fact is that the argument was made in the Supreme Court of Connecticut that the tax could not apply for two reasons. One of the insistences of the taxpayer in the Connecticut court was that the stocks and bonds had acquired a business situs in New York and were beyond the reach of the transfer tax of Connecticut. This contention was decided adversely to the taxpayer. When the taxpayer brought the case to this Court for review he apparently abandoned the contention of business situs and merely urged that the statute seeking to levy the tax was unconstitutional as retroactive because passed subsequently to the transfer but prior to the death of the decedent.

The opinion of the Supreme Court of Connecticut is *Blodgett* v. *Guaranty Trust Co.*, 158 Atl., 245. The opinion discusses *Blodgett* v. *Silberman, supra; First National Bank of Boston* v. *Maine, supra; Bullen* v. *Wisconsin, supra*, and

other cases, and definitely sustained the right of the state of domicile.

Hackett v. *Bankers Trust Co.*, 187 Atl., 653, involved the right of Connecticut to include in the estate of the decedent for purposes of inheritance taxes stocks and bonds held in trust in New York. The trustees and beneficiaries claimed that Connecticut had no right to tax the transfers on the ground that the corpus of the trusts had acquired a business situs in New York. Under the trust instruments, the trustee in New York had the duty of managing and reinvesting the property, collecting the income therefrom, and ultimately delivering the principal as directed by the settlor. The Court, in deciding that the stocks and bonds had not acquired a business situs in New York and that their transfer was taxable in Connecticut, said:

> "Quite recently, in *Manufacturers Trust Co.* v. *Hackett* (1934), 118 Conn., 101; 170 A., 792, we had occasion to consider the question of business situs. . . . After thorough examination and discussion of the authorities relevant to the inquiry we held . . . that in order to constitute business situs 'there must be a continuous or permanent business in the state in which it is sought to establish the situs' and that the property employed 'must be localized in some independent business so that its substantial use and value primarily attach to and become an asset of a business outside of the state of the owner's domicile and constitute, as it were, the subject-matter or stock in trade of that business.' No argument has now been advanced, nor has any additional precedent been cited which inclines us to alter the view there expressed.
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> "Under each of the trusts now under consideration funds of the settlor were intrusted to the trustee under a general duty on its part to hold, manage, invest, and reinvest the same, subject to some reserved rights of instruction and direction, collect the income and profits, and pay the net income and ultimately deliver the prin-

cipal as specified in the trust instruments, respectively. We are unable to see that this situation, any more than that presented in *Manufacturers Trust Co.* v. *Hackett*, may fairly be regarded as 'engaging or employing . . . capital in business by the decedent . . . in any sense which reason and the precedents, when broadly considered, indicate as being that contemplated in order to constitute business situs' 118 Conn., 101, at page 110; 170 A., 792, 795."

In Re: Estate of Frank, 192 Minn., 151; 257 N. W., 330; 96 A. L. R., 667, was a case where the settlor while a resident of North Dakota transferred intangible property to a Minnesota Trust Company as trustee, reserving the income for life, the power to supervise investments and to change or revoke the trust. He died domiciled in North Dakota. The highest court of Minnesota, with two Justices dissenting and the Chief Justice taking no part, sustained the right of Minnesota to levy an inheritance tax. Upon petition to rehear, the Minnesota Court reconsidered its conclusion, decided it was wrong, and with only one Justice dissenting, held that only North Dakota, the state of the decedent's domicile, could levy an inheritance tax. The Court rested its conclusion upon *First National Bank of Boston* v. *Maine*, *Blodgett* v. *Silberman* and *Bullen* v. *Wisconsin*. The gist of the opinion is contained in the following sentence:

"The involved trust property had not acquired in Minnesota, 'a situs analogous to the actual situs of tangible personal property' within the reservation of the Maine case. *It was not part of any local business conducted by Mr. Frank.*"

In Re: Ellis' Estate, 169 Wash., 581; 14 Pac. (2d), 37, was decided by the highest Court of the State of Washington on September 20, 1932 and followed the decision of this Court in *First National Bank of Boston* v. *Maine*, *supra*, on January 4, 1932. This suit involved an inheritance tax of the State of Washington levied on the transfer of certain prop-

erty held in trust. The decedent, Mrs. Ellis, had established trusts consisting of $58,000.00 in intangible property located within the state of Illinois. The beneficiaries of the trusts were to come into complete enjoyment thereof upon Mrs. Ellis' death. Mrs. Ellis at the time of her death was domiciled in the state of Washington. The executors of the will of the settlor contended that the trust property had acquired a situs in the state of Illinois and that its transfer was therefore not taxable in Washington. The Supreme Court of Washington, while conceding that under the trust instruments executed by Mrs. Ellis the Illinois trustee had large powers and exercised considerable control over the trust property, ignored the executors' contention that the property had acquired a business situs in Illinois and held that the transfer was taxable by the state of Washington.

In Re: Estate of James Parmelee, decided by the Probate Court of Cuyahoga County and reported in 7 Ohio Opinions, Ann., 455, involves a situation quite similar to the case at bar. James Parmelee, a nonresident of the state of Ohio, conveyed to a trust company domiciled in Ohio certain intangible personal property. The trustee was to make investments only as the settlor should direct in writing. The settlor reserved during his life the right to revoke the trust and the trust terminated with death of the settlor. An effort by Ohio to impose a transfer tax upon the death of the settlor was defeated, the Court holding that the intangible property conveyed in trust did not acquire a business situs in that state. On behalf of the Tax Commission of Ohio a writ of *certiorari* was sought in this Court and the writ was dismissed, upon argument it appearing "that the judgment sought to be reviewed rests upon a non-Federal ground adequate to support it." This was No. 215, October Term, 1937, the writ being dismissed. — U. S., —, 82 L. Ed., (Advance), 1035.

First National Bank of Boston v. Maine, supra, merely confines succession taxation to one state.

We submit that when this Court in *First National Bank of Boston* v. *Maine, supra,* and other cases laid down the rule that only one state can levy a succession tax upon intangible property the Court was not introducing a new concept as to the situs of property. It was not intended to transfer the right to levy a succession tax from one state which had exercised the power to another state which had not exercised the power. Yet as we understand the contention of our adversaries their insistence is that a power which belonged to the state of domicile prior to *First National Bank of Boston* v. *Maine* now belongs to the state where the trust is situated. Apparently they take the position that the right now claimed for the state of Alabama results from certain language used in *First National Bank of Boston* v. *Maine* and other cases indicating a *possible* exception to the general rule. They cite no case either before or since this decision where the state of domicile has been denied the right to tax the transfer which results when a settlor who has created a trust, reserving the life estate and the power of disposition, makes a will transferring such property.

First National Bank of Boston v. *Maine, supra,* merely confined succession taxes to one state and as the opinion says:

> "Practical consideration of wisdom, convenience and justice alike dictate the desirability of a uniform general rule confining the jurisdiction to impose death transfer taxes as to intangibles to the state of the domicile."

The adoption of a rule adverse to the state of domicile would open the door to tax evasion, fraud and confusion.

We are confident that this Court will not look with favor upon any rule which would permit a resident of one state

to accumulate property and enjoy the protection of its government and then transfer his intangibles to some other state, subject to his own right of testamentary disposition, for the purpose of enabling his heirs or beneficiaries to avoid an inheritance tax in the state of decedent's domicile. This would be the practical effect of the rule for which our adversaries are contending. The approval of a trust device to create a "business situs" for inheritance tax purposes in a state other than the domicile of the settlor would lead immediately to the transfer of jurisdiction from the state of domicile to some other state.

Furthermore, if the settlor can reserve the life income, the power of encroachment, the absolute control over investments, the right to name a substitute trustee and the power to dispose of his property at his death, then a person could transfer his intangibles from jurisdiction to jurisdiction by the use of a trust agreement. The conflict and discord between the states which would result are obvious. This Court was originally moved to announce the rule of immunity from taxation by more than one state in order to prevent the injustice of double taxation and the resulting friction between the states. It would be amazing if a principle announced to prevent taxation in two or more jurisdictions should now be extended and applied to permit a person residing all the while in one locality, accumulating his property there and enjoying the protection of its laws, to move his intangibles from place to place for the purpose of avoiding inheritance tax. The inevitable tendency of such a rule would be to create controversies between the state of domicile and the state of business situs as to the existence of the asserted business situs.

We call attention to the recent decision of *First Bank Stock Corp.* v. *Minnesota*, 301 U. S., 234; 81 L. Ed., 1061, which is an *ad valorem* tax case and not relevant except the following general statement of the Court:

"*Mobilia sequuntur personam*, which has won unqualified acceptance when applied to the taxation of intangibles, *Blodgett* v. *Silberman*, 277 U. S., 1, 9, 10; 72 L. Ed., 749, 756, 757; 48 St. Ct., 410, states a rule without disclosing the reasons for it. But we have recently had occasion to point out that enjoyment by the resident of a state of the protection of its laws is inseparable from the responsibility for sharing the costs of its government, and that a tax measured by the value of rights protected is but an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefits." (Page 1065.)

Authorities relied on by appellants are distinguishable.

We submit that every case cited and relied upon by adversary counsel is distinguishable and that they cite no case, the holding or a dictum of which sustains their contention. Most of the cases referred to in their brief have heretofore been discussed. Those not heretofore mentioned include the following:

New Orleans v. *Stempel*, 175 U. S., 309, relied upon by appellants, involved the right of Louisiana to impose an *ad valorem* tax upon certain intangible property which the Court declared to be "property arising from business done in the state."

The stocks and bonds held in the trust created by Mrs. Scales were not property arising from business done in Alabama. These securities were intangible property, the value of which did not arise from the fact that they were held in trust in Alabama. Such securities would have possessed precisely the same value whether in trust in Alabama or elsewhere and also if not held in any trust. When adversary counsel state on page 10 of their brief that the Alabama trustee was, in reality, an agent having possession

of certain stocks and bonds, they bring the present case squarely within the authority of *Blodgett* v. *Silberman, supra,* and they must ask this Court to overrule that case if they are to prevail.

Safe Deposit and Trust Co. v. *Virginia,* 280 U. S., 83, also relied upon by appellants, is distinguishable on grounds pointed out in the opinion below. (R., pp. 53-54.) We also stress the facts repeatedly emphasized in the opinion of this Court that no person in the state of residence of the equitable owners had any present right to enjoyment in the trust or any power to control the trust or any power to remove it from the state where the trustee was domiciled. These distinctions are so obvious as to render it unnecessary to consider whether the fact that this was an *ad valorem* tax case, and not a succession tax case, is important. In passing, it may be noted that several courts and text authorities have said that decisions relating to the situs of property for the purpose of direct taxation are not controlling in determining the situs for the purpose of an inheritance tax; but we see no reason to elaborate upon this question and upon whether it is practicably tenable if not strictly logical.

Senior v. *Braden,* 295 U. S., 422, also relied upon by appellants, held that a state is without power to levy an *ad valorem* tax upon land trust certificates representing interests in various parcels of land, some of which were outside the state. The state had sought to levy the tax as one upon intangible property of a resident. The basis of the holding is that the thing sought to be subjected to taxation is really an interest in land beyond the jurisdiction of the Court.

Burnet v. *Brooks,* 288 U. S., 378, and *Hutchison* v. *Ross,* 262 N. Y., 381, are not urged by appellants as authority because of the holding but there is merely an effort to use certain general language of the opinion in support of the

contention now made by distinguished adversary counsel. We submit that the language relied upon is not even a dictum in support of their position.

Matter of Brown, 274 N. Y., 10, is cited but not discussed by appellants. In view of the fact that the writ of *certiorari* has been granted by this Court and that this case is to be heard approximately at the same time as the case at bar we shall not comment upon the distinction betweer it and the case at bar. It is noteworthy that the Court of Appeals of New York did not regard itself as deciding the case at bar but regarded such a case as clearly distinguishable from the facts presented to it for decision.

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CONCLUSION.

We submit that the decree of the Supreme Court of Tennessee ought to be affirmed (1) for the reason that under the facts presented there was merely a testamentary transfer by a resident of Tennessee of stocks and bonds belonging to her and physically kept in Alabama; (2) for the reason that, assuming there to be a testamentary transfer of an interest in a trust, the mere deposit of securities with a trustee in another state does not give them a business situs within the meaning of the one *possible* exception to the general rule *mobilia sequuntur personam;* and (3) for the reason that, assuming the possible exception to the general rule now to be presented so as to require a decision of the question heretofore expressly reserved, such question ought to be decided in favor of the state of domicile.

Respectfully submitted,

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I hereby certify that three copies of the foregoing Brief and Argument were mailed, postage prepaid, to Ray Rushton, Bell Building, Montgomery, Alabama, of counsel for appellants, on December 31, 1938.

EDWIN F. HUNT,
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SUPREME COURT OF THE UNITED STATES.

No. 339.—October Term, 1938.

John C. Curry, as State Tax Commissioner of the State of Alabama, et al., Appellants,
vs.
George F. McCanless, as Commissioner of Finance and Taxation of the State of Tennessee.

Appeal from the Supreme Court of the State of Tennessee.

[May 29, 1939.]

Mr. Justice Stone delivered the opinion of the Court.

The questions for decision are whether the States of Alabama and Tennessee may each constitutionally impose death taxes upon the transfer of an interest in intangibles held in trust by an Alabama trustee but passing under the will of a beneficiary decedent domiciled in Tennessee; and which of the two states may tax in the event that it is determined that only one state may constitutionally impose the tax.

Decedent, a domiciled resident of Tennessee, by trust indenture transferred certain stocks and bonds upon specified trusts to Title Guarantee Loan & Trust Company, an Alabama corporation doing business in that state. So far as now material, the indenture provided that the net income of the trust property should be paid over to decedent during her lifetime. She reserved the power to remove the trustee and substitute another, which was never done; the power to direct the sale of the trust property and the investment of the proceeds; and the power to dispose of the trust estate by her last will and testament, in which event it was to be "handled and disposed of as directed" in her will. The indenture provided further that in default of disposition by will the property was to be held in trust for the benefit of her husband, son, and daughter. Until decedent's death the trust was administered by the trust company in Alabama and the paper evidences of the intangibles held by the trustee were at all times located in Alabama.

By her last will and testament decedent bequeathed the trust property to the trust company in trust for the benefit of her hus-

band, son, and daughter, in different amounts and by different estates from those provided for by the trust indenture, with remainder interests over to the children of the son and the daughter respectively, and to his wife and her husband. By her will testatrix appointed a Tennessee trust company executor "as to all property which I may own in the State of Tennessee at the time of my death", and an Alabama trust company executor "as to all property which I may own in the State of Alabama and also as to all property which I may have the right to dispose of by last will and testament in said state". The will has been probated in Tennessee and in Alabama, and letters testamentary have issued to the two trust companies named as executors in the will.

The present suit was brought by the two executors in a chancery court of Tennessee against appellants, comprising the State Tax Commission of Alabama, and appellee, Commissioner of Finance and Taxation of the State of Tennessee, who are charged with the duty of collecting inheritance or succession taxes in their respective states. The bill of complaint prayed a declaratory judgment pursuant to the Tennessee Declaratory Judgments Act, Tennessee Code, 1932, §§ 8835-8847, determining what portions of the estate of decedent are taxable by the State of Tennessee and what portions by the State of Alabama. Appellants and appellee appeared and by their answers and by stipulation recited in detail the facts already stated and admitted that the taxing officials of each state had imposed or asserted the right to impose an inheritance or death transfer tax on the trust property passing under decedent's will.

The chancery court of Tennessee decreed that the State of Alabama could lawfully impose the tax and that the inheritance tax law of Tennessee violated the Fourteenth Amendment in so far as it purported to impose a tax measured by the trust property disposed of by decedent's will. The Supreme Court of Tennessee reversed, and entered its decree declaring the trust property disposed of by decedent's will to be "taxable in Tennessee and not taxable in Alabama for purposes of death succession or transfer taxes". — Tenn. —. The case comes here on an appeal from this decree taken by the taxing officials of Alabama under § 237(a) of the Judicial Code, 28 U. S. C. § 344(a).

Alabama has assessed a state inheritance tax on the trust property pursuant to Article XII, c. 2, of its General Revenue Act. Alabama Acts, 1935, pp. 434 *et seq.* No transfer tax has been assessed upon the property by the Tennessee taxing officials, but they

assert the right under the Tennessee statute to tax the transfer under decedent's will of the trust property. Sections 1259 and 1260 of the Tennessee Code of 1932 impose a tax upon the transfer at death by a resident of the state of his intangible property wherever located, including transfers under powers of appointment.

Both the court of chancery of Tennessee and the Supreme Court of Tennessee, conceiving that the Fourteenth Amendment requires the transmission at death of intangibles to be taxed at their "situs" and there only, considered that the primary question for determination was the situs or location to be attributed to the intangibles of the trust estate at the time of decedent's death. After considering all of the relevant factors, the one court concluded that the situs of the intangibles was in Alabama, the other that it was in Tennessee. Despite the impossibility in the circumstances of this case of attributing a single location to that which has no physical characteristics and which is associated in numerous intimate ways with both states, both courts have agreed that the Fourteenth Amendment compels the attribution to be made and that, once it is established by judicial pronouncement that the intangibles are in one state rather than the other, the due process clause forbids their taxation in any other.

The doctrine, of recent origin, that the Fourteenth Amendment precludes the taxation of any interest in the same intangible in more than one state has received support to the limited extent that it was applied in *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204; *Baldwin* v. *Missouri,* 281 U. S. 586; *First National Bank* v. *Maine,* 284 U. S. 312. Still more recently this Court has declined to give it completely logical application.[1] It has never been pressed to the extreme now urged upon us, and we think that neither reason nor authority requires its acceptance in the circumstances of the present case.

That rights in tangibles—land and chattels—are to be regarded in many respects as localized at the place where the tangible itself is located for purposes of the jurisdiction of a court to make disposition of putative rights in them, for purposes of conflict of laws, and for purposes of taxation, is a doctrine generally ac-

[1] See, in the case of income taxation, Lawrence *v.* State Tax Comm'n, 286 U. S. 276; New York ex rel. Cohn *v.* Graves, 300 U. S. 308; Guaranty Trust Co. *v.* Virginia, 305 U. S. 19; cf. Senior *v.* Braden, 295 U. S. 422, 431-432. And in the case of taxation of shares of stock, see Corry *v.* Baltimore, 196 U. S. 466; First Bank Stock Corp. *v.* Minnesota, 301 U. S. 234, 239-240; Schuylkill Trust Co. *v.* Pennsylvania, 302 U. S. 506, 514-516.

cepted both in the common law and other legal systems before the adoption of the Fourteenth Amendment and since.[2] Originating, it has been thought, in the tendency of the mind to identify rights with their physical subjects, see Salmond, Jurisprudence (2nd ed.) 398, its survival and the consequent cleavage between the rules of law applicable to tangibles and those relating to intangibles are attributable to the exclusive dominion exerted over the tangibles themselves by the government within whose territorial limits they are found. *Green* v. *Van Buskirk,* 7 Wall. 139, 150; *Pennoyer* v. *Neff,* 95 U. S. 714; *Arndt* v. *Griggs,* 134 U. S. 316, 320-321. See *McDonald* v. *Mabee,* 243 U. S. 90, 91; cf. *Harris* v. *Balk,* 198 U. S. 215, 222; *Frick* v. *Pennsylvania, supra,* 497. The power of government and its agencies to possess and to exclude others from possessing tangibles, and thus to exclude them from enjoying rights in tangibles located within its territory, affords adequate basis for an exclusive taxing jurisdiction. When we speak of the jurisdiction to tax land or chattels as being exclusively in the state where they are physically located, we mean no more than that the benefit and protection of laws enabling the owner to enjoy the fruits of his ownership and the power to reach effectively the interests protected, for the purpose of subjecting them to payment of a tax, are so narrowly restricted to the state in whose territory the physical property is located as to set practical limits to taxation by others. Other states have been said to be without jurisdiction and so without constitutional power to tax tangibles if, because of their location elsewhere, those states can afford no substantial protection to the rights taxed and cannot effectively lay hold of any interest in the property in order to compel payment of the tax. See *Union Transit Co.* v. *Kentucky,* 199 U. S. 194, 202; *Frick* v. *Pennsylvania,* 268 U. S. 473, 489 *et seq.*[3]

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[2] Green *v.* Van Buskirk, 5 Wall. 307; 7 Wall. 139; Pennoyer *v.* Neff, 95 U. S. 714; Arndt *v.* Griggs, 134 U. S. 316; Fall *v.* Eastin, 215 U. S. 1; Olmsted *v.* Olmsted, 216 U. S. 386; United States *v.* Guaranty Trust Co., 293 U. S. 340, 345-346; Paddell *v.* New York, 211 U. S. 446; St. Louis *v.* Ferry Co., 11 Wall. 423, 430; Frick *v.* Pennsylvania, 268 U. S. 473; see Story, Conflict of Laws (8th ed.), §§ 550, 551; Dicey, Conflict of Laws (5th ed.), pp. 418, *et seq.,* 583 *et seq.,* 606 *et seq.;* 1 Beale, Conflict of Laws, § 48.1 *et seq.;* American Law Institute, Restatement of Conflict of Laws, §§ 48, 49; 2 Cooley, Taxation (4th ed.), §§ 447, 451.

[3] But there are many legal interests other than conventional ownership which may be created with respect to land of such a character that they may be constitutionally subjected to taxation in states other than that where the land is situated. No one has doubted the constitutional power of a state to tax its domiciled residents on their shares of stock in a foreign corporation whose only property is real estate located elsewhere, Darnell *v.* Indiana, 226

Very different considerations, both theoretical and practical, apply to the taxation of intangibles, that is, rights which are not related to physical things. Such rights are but relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions enforceable in courts. The power of government over them and the protection which it gives them cannot be exerted through control of a physical thing. They can be made effective only through control over and protection afforded to those persons whose relationships are the origin of the rights. See *Chicago, R. I. & P. Ry.* v. *Sturm*, 174 U. S. 710, 716; *Harris* v. *Balk*, 198 U. S. 215, 222. Obviously, as sources of actual or potential wealth—which is an appropriate measure of any tax imposed on ownership or its exercise—they cannot be dissociated from the persons from whose relationships they are derived. These are not in any sense fictions. They are indisputable realities.

The power to tax "is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a State extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation." *McCulloch* v. *Maryland*, 4 Wheat. 316, 429. But this does not mean that the sovereign power of the state does not extend over intangibles of a domiciled resident because they have no physical location within its territory, or that its power to tax is lost because we may choose to say they are located elsewhere. A jurisdiction which does not depend on physical presence within the state is not lost by declaring that it is absent. From

U. S. 390; Hawley *v.* Malden, 232 U. S. 1; cf. Kidd *v.* Alabama, 188 U. S. 730; Corry *v.* Baltimore, 196 U. S. 466; Cream of Wheat Co. *v.* County of Grand Forks, 253 U. S. 325, 329; Schuylkill Trust Co. *v.* Pennsylvania, 302 U. S. 506, 514-516, or to tax a valuable contract for the purchase of land or chattels located in another state, see Citizens National Bank *v.* Durr, 257 U. S. 99, 108; cf. Gish *v.* Shaver, 140 Ky. 647, 650; Golden *v.* Munsinger, 91 Kan. 820, 823; Marquette *v.* Michigan Iron & Land Co., 132 Mich. 130, or to tax a mortgage of real estate located without the state, even though the land affords the only source of payment, see Kirtland *v.* Hotchkiss, 100 U. S. 491; cf. Savings and Loan Society *v.* Multnomah County, 169 U. S. 421; Bristol *v.* Washington County, 177 U. S. 133; Paddell *v.* New York, 211 U. S. 446. Each of these legal interests finds its only economic source in the value of the land, and the rights which are elsewhere subjected to the tax can be brought to their ultimate fruition only through some means of control of the land itself. But the means of control may be subjected to taxation in the state of its owner whether it be a share of stock or a contract or a mortgage. There is no want of jurisdiction to tax these interests where they are owned in the sense that the state lacks power to appropriate them to the payment of the tax. No court has condemned such action as so capricious, arbitrary or oppressive as to bring it within the prohibition of the Fourteenth Amendment, for it is universally recognized that these interests are of themselves in some measure clothed with the legal incidents of property enjoyed by their owner, in the state where he resides, through the benefit and protection of its laws.

the beginning of our constitutional system control over the person at the place of his domicile and his duty there, common to all citizens, to contribute to the support of government, have been deemed to afford an adequate constitutional basis for imposing on him a tax on the use and enjoyment of rights in intangibles measured by their value. Until this moment that jurisdiction has not been thought to depend on any factor other than the domicile of the owner within the taxing state, or to compel the attribution to intangibles of a physical presence within its territory, as though they were chattels, in order to support the tax. *Carpenter* v. *Pennsylvania*, 17 How. 456; *Kirtland* v. *Hotchkiss*, 100 U. S. 491; *Hawley* v. *Malden*, 232 U. S. 1; *Bullen* v. *Wisconsin*, 240 U. S. 625; *Cream of Wheat Co.* v. *County of Grand Forks*, 253 U. S. 325; *Blodgett* v. *Silberman*, 277 U. S. 1; *Farmers Loan & Trust Co.* v. *Minnesota, supra; Baldwin* v. *Missouri, supra; Beidler* v. *South Carolina*, 282 U. S. 1; *First National Bank* v. *Maine, supra; Virginia* v. *Imperial Coal Sales Co.*, 293 U. S. 15; *Schuylkill Trust Co.* v. *Pennsylvania*, 302 U. S. 506.

In cases where the owner of intangibles confines his activity to the place of his domicile it has been found convenient to substitute a rule for a reason, cf. *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308, 313; *First Bank Stock Corp.* v. *Minnesota*, 301 U. S. 234, 241, by saying that his intangibles are taxed at their situs and not elsewhere, or, perhaps less artifically, by invoking the maxim *mobilia sequuntur personam, Blodgett* v. *Silberman, supra; Baldwin* v. *Missouri, supra*, which means only that it is the identity or association of intangibles with the person of their owner at his domicile which gives jurisdiction to tax. But when the taxpayer extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another state, in such a way as to bring his person or property within the reach of the tax gatherer there, the reason for a single place of taxation no longer obtains, and the rule is not even a workable substitute for the reasons which may exist in any particular case to support the constitutional power of each state concerned to tax. Whether we regard the right of a state to tax as founded on power over the object taxed, as declared by Chief Justice Marshall in *McCulloch* v. *Maryland, supra*, through dominion over tangibles or over persons whose relationships are the source of intangible rights; or on the benefit and protection conferred by the taxing sovereignty, or both, it is undeniable that the state of domicile is not deprived, by the

taxpayer's activities elsewhere, of its constitutional jurisdiction to tax, and consequently that there are many circumstances in which more than one state may have jurisdiction to impose a tax and measure it by some or all of the taxpayer's intangibles. Shares of corporate stock may be taxed at the domicile of the shareholder and also at that of the corporation which the taxing state has created and controls; and income may be taxed both by the state where it is earned and by the state of the recipient's domicile.[4] Protection, benefit, and power over the subject matter are not confined to either state. The taxpayer who is domiciled in one state but carries on business in another is subject to a tax there measured by the value of the intangibles used in his business. *New Orleans* v. *Stempel,* 175 U. S. 309; *Bristol* v. *Washington County,* 177 U. S. 133; *Board of Assessors* v. *Comptoir National,* 191 U. S. 388; *Metropolitan Life Insurance Co.* v. *New Orleans,* 205 U. S. 395; *Liverpool Ins. Co.* v. *Board,* 221 U. S. 346; *Wheeling Steel Corp.* v. *Fox,* 298 U. S. 193; cf. *Blodgett* v. *Silberman, supra; Baldwin* v. *Missouri, supra.* But taxation of a corporation by a state where it does business, measured by the value of the intangibles used in its business there, does not preclude the state of incorporation from imposing a tax measured by all its intangibles. *Cream of Wheat Co.* v. *County of Grand Forks, supra,* 329;[5] see *Fidelity & Columbia Trust Co.* v. *Louisville,* 245 U. S. 54.

The practical obstacles and unwarranted curtailments of state power which may be involved in attempting to prevent the taxation of diverse legal interests in intangibles in more than a single place, through first ascribing to them a fictitious situs and then invoking the prohibition of the Fourteenth Amendment against their taxation elsewhere, are exemplified by the circumstances of the present case. Here, for reasons of her own, the testatrix, although domiciled in Tennessee and enjoying the benefits of its laws, found it advantageous to create a trust of intangibles in Alabama by vesting legal title to the intangibles and limited powers of control over them in an Alabama trustee. But she also provided that by resort to her power to dispose of property by will, conferred upon her by the law of the domicile, the trust could be terminated and the property pass under the will. She thus created two sets of legal relationships resulting in distinct intangible rights, the one embodied in the legal ownership by the

[4] See Footnote 1, *ante.*

[5] See also Footnote 2, *ante.*

Alabama trustee of the intangibles, the other embodied in the equitable right of the decedent to control the action of the trustee with respect to the trust property and to compel it to pay over to her the income during her life, and in her power to dispose of the property at death.

Even if we could rightly regard these various and distinct legal interests, springing from distinct relationships, as a composite unitary interest and ascribe to it a single location in space, it is difficult to see how it could be said to be more in one state than in the other and upon what articulate principle the Fourteenth Amendment could be thought to have withdrawn from either state the taxing jurisdiction which it undoubtedly possessed before the adoption of the Amendment by conferring on one state, at the expense of the other, exclusive jurisdiction to tax. See *Paddell* v. *City of New York,* 211 U. S. 446, 448. If the "due process" of the Fifth Amendment does not require us to fix a single exclusive place of taxation of intangibles for the benefit of their foreign owner, who is entitled to its protection, *Burnet* v. *Brooks,* 288 U. S. 378; cf. *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, 489, the Fourteenth can hardly be thought to make us do so here, for the due process clause of each amendment is directed at the protection of the individual and he is entitled to its immunity as much against the state as against the national government.

If taxation is but a means of distributing the cost of government among those who are subject to its control and who enjoy the protection of its laws, see *New York ex rel. Cohn* v. *Graves, supra,* 313; *First Bank Stock Corp.* v. *Minnesota, supra,* 241, legal ownership of the intangibles in Alabama by the Alabama trustee would seem to afford adequate basis for imposing on him a tax measured by their value. We can find no more ground for saying that the Fourteenth Amendment relieves it, or the property which it holds and administers in Alabama, from bearing that burden, than for saying that they are constitutionally immune from paying any other expense which normally attaches to the administration of a trust in that state. This Court has never denied the constitutional power of the trustee's domicile to subject them to property taxation. *Safe Deposit & Trust Co.* v. *Virginia,* 280 U. S. 83; see cases collected in 30 Columbia Law Rev. 530; 2 Cooley, Taxation (8th ed.), § 602. And since Alabama may lawfully tax the property in the trustee's hands, we perceive no ground for saying that the Fourteenth Amendment forbids the

state to tax the transfer of it or an interest in it to another merely because the transfer was effected by decedent's testamentary act in another state.

No more plausible ground is assigned for depriving Tennesscee of the power to tax in the circumstances of this case. The decedent's power to dispose of the intangibles was a potential source of wealth which was property in her hands from which she was under the highest obligation, in common with her fellow citizens of Tennessee, to contribute to the support of the government whose protection she enjoyed. Exercise of that power, which was in her complete and exclusive control in Tennessee, was made a taxable event by the statutes of the state. Taxation of it must be taken to be as much within the jurisdiction of the state as taxation of the transfer of a mortgage on land located in another state and there subject to taxation at its full value. See *Kirtland* v. *Hotchkiss, supra;* cf. *Paddell* v. *City of New York, supra.*

For purposes of taxation, a general power of appointment, of which the testatrix here was both donor and donee, has hitherto been regarded by this Court as equivalent to ownership of the property subject to the power. *Chanler* v. *Kelsey*, 205 U. S. 466; *Bullen* v. *Wisconsin, supra,* 630; *Chase National Bank* v. *United States,* 278 U. S. 327, 338; see Gray, Rule Against Perpetuities (3d ed. 1916), § 524.[6] Whether the appointee derives title from the donor, under the common law theory, or from the donee by virtue of the exercise of the power, is here immaterial. In either event the trustee's title under the will was derived from decedent, domiciled in Tennessee. Cf. *Wachovia Trust Co.* v. *Doughton,* 272 U. S. 567. There is no conflict here between the laws of the two states affecting the transmission of the trust property. The title of the trustee under the original Alabama trust came to an end upon the exercise of the testatrix's power of appointment; and although the trustee after her death still had title to the securities, it was in by a new title as legatee under her will, and a new beneficial interest was created, both derived through the exercise of her power of disposition. The resulting situation was no different from what it would have been if she had bequeathed the intangibles upon a new trust to a new and different trustee, either within or without the state of Alabama. So far as the power of Tennessee to tax the exercise of the power of appointment is concerned, there is no substan-

[6] No comparable right or power resided in the beneficiaries upon whom a tax was sought to be levied in Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83, 91.

tial difference between the present case and any other case in which at the moment of death the evidences of intangibles passing under the will of a decedent domiciled in one state are physically present in another. See *Blodgett* v. *Silberman, supra; Baldwin* v. *Missouri, supra.*

It has hitherto been the accepted law of this Court that the state of domicile may constitutionally tax the exercise or non-exercise at death of a general power of appointment, by one who is both donor and donee of the power, relating to securities held in trust in another state. *Bullen* v. *Wisconsin, supra.* If it be thought that it is identity of the intangibles with the person of the owner at the place of his domicile which gives power over them and hence "jurisdiction to tax", and this is the reason underlying the maxim *mobilia sequuntur personam*, it is certain here that the intangibles for some purposes are identified with the trustee, their legal owner, at the place of its domicile and that in another and different relationship and for a different purpose—the exercise of the power of disposition at death, which is the equivalent of ownership—they are identified with the place of domicile of the testatrix, Tennessee. In effecting her purposes, the testatrix brought some of the legal interests which she created within the control of one state by selecting a trustee there and others within the control of the other state by making her domicile there. She necessarily invoked the aid of the law of both states, and her legatees, before they can secure and enjoy the benefits of succession, must invoke the law of both.

We can find nothing in the history of the Fourteenth Amendment and no support in reason, principle, or authority for saying that it prohibits either state, in the circumstances of this case, from laying the tax. On the contrary this Court, in sustaining the tax at the place of domicile in a case like the present, has declared that both the decedent's domicile and that of the trustee are free to tax. *Bullen* v. *Wisconsin, supra,* 631; cf. *Keeney* v. *New York*, 222 U. S. 525, 537; *Guaranty Trust Co.* v. *Blodgett*, 287 U. S. 509. That has remained the law of this Court until the present moment, and we see no reason for discarding it now. We find it impossible to say that taxation of intangibles can be reduced in every case to the mere mechanical operation of locating at a single place, and there taxing, every legal interest growing out of all the complex legal relationships which may be entered into between persons. This is the case because in point of actuality those interests may be too diverse in their relationships to various taxing jurisdictions

to admit of unitary treatment without discarding modes of taxation long accepted and applied before the Fourteenth Amendment was adopted, and still recognized by this Court as valid. See *Paddell* v. *New York, supra,* 448. The Fourteenth Amendment cannot be carried out with such mechanical nicety without infringing powers which we think have not yet been withdrawn from the states. We have recently declined to press to a logical extreme the doctrine that the Fourteenth Amendment may be invoked to compel the taxation of intangibles by only a single state by attributing to them a situs within that state.[7] We think it cannot be pressed so far here.

If we enjoyed the freedom of the framers it is possible that we might, in the light of experience, devise a more equitable system of taxation than that which they gave us. But we are convinced that that end cannot be attained by the device of ascribing to intangibles in every case à locus for taxation in a single state despite the multiple legal interests to which they may give rise and despite the control over them or their transmission by any other state and its legitimate interest in taxing the one or the other. While fictions are sometimes invented in order to realize the judicial conception of justice, we cannot define the constitutional guaranty in terms of a fiction so unrelated to reality without creating as many tax injustices as we would avoid and without exercising a power to remake constitutional provisions which the Constitution has not given to the courts. See *Bristol* v. *Washington County, supra,* 145; *Kidd* v. *Alabama,* 188 U. S. 730, 732, quoted with approval in *Hawley* v. *Malden, supra,* 13; *Bullen* v. *Wisconsin, supra,* 630; *Fidelity & Columbia Trust Co.* v. *Louisville, supra,* 58; *Cream of Wheat Co.* v. *County of Grand Forks, supra,* 330.

So far as the decree of the Supreme Court of Tennessee denies the power of Alabama to tax, it is

Reversed.

Mr. Justice REED concurs in this opinion except as to the statement that "taxation of a corporation by a state where it does business, measured by the value of the intangibles used in its business there, does not preclude the state of incorporation from imposing a tax measured by all its intangibles." Upon this point he reserves his conclusion.

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[7] See Footnote 1, *ante.*

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SUPREME COURT OF THE UNITED STATES.

No. 339.—October Term, 1938.

John C. Curry, as State Tax Commissioner of the State of Alabama, et al., Appellants,
vs.
George F. McCanless, as Commissioner of Finance and Taxation of the State of Tennessee.

Appeal from the Supreme Court of the State of Tennessee.

[May 22, 1939.]

Mr. Justice Butler, dissenting.

The sole question is whether, on the facts about to be stated, the Tennessee inheritance tax law, consistently with the due process clause of the Fourteenth Amendment, may be extended to intangible personal property evidenced by certificates of stock and bonds held in Alabama.

The suit was brought in a chancery court of Tennessee under the declaratory judgments act of that State.[1] Complainants were the Nashville Trust Company, a Tennessee corporation appointed by the will of Mrs. Grace C. Scales as executor for Tennessee, and the Title Guarantee Loan & Trust Company, which will be referred to as the Birmingham trust company, an Alabama corporation appointed as executor for that State. Defendants were the Commissioner of Finance and Taxation of Tennessee, and the members of the Alabama Tax Commission. The bill prayed that the court determine what portions of the estate are taxable by Tennessee and what portions are taxable by Alabama. The Tennessee commissioner filed answer praying declaration and decree that the securities held in Alabama are subject to the inheritance tax law of Tennessee.[2] The members of the Alabama commission filed their

[1] Tennessee Code, 1932, §§ 8835-8847.

[2] Tennessee Code, 1932: "Section 1259. Subdivision 1. . . . A tax is imposed . . . upon transfers, in trust or otherwise, of the following property, or any interest therein or accrued income therefrom: (a) When the

answer and a cross-bill praying decree in favor of that State and against the Birmingham trust company for the tax claimed under the laws of Alabama.[3]

The parties stipulated that the facts are as stated in the pleadings. In substance they are as follows:

At all times involved in this case, Mrs. Scales was a resident of and domiciled in Tennessee. Her brother, formerly living in Alabama, died in 1905 leaving a will that bequeathed to the Birmingham trust company stocks and bonds issued by Alabama corporations to be held in trust for the use and benefit of his widow and at her death to be delivered to Mrs. Scales. The widow died in 1917. Immediately, December 29, 1917, and without taking any of them from the possession of the trust company, Mrs. Scales executed jointly with it an indenture covering the stocks and bonds of which she had become owner under her brother's will.

By paragraph 1, she transferred 50 bonds to the trust company as trustee for the use and benefit of her son and directed that it hold and manage the property and pay net income to him during his life, and that, subject to his power of disposition by will, all property belonging to the trust at the time of his death should go to his children. By paragraph 2, she transferred to the same company 50 other bonds to be held in trust for the benefit of her daughter subject to trusts, conditions, and power of testamentary appointment by her daughter like those specified in the provisions creating the trust for her son.

By paragraph 3, she transferred to the same trustee the balance of the property by it to be held in trust and managed for specified

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transfer is from a resident of this state . . . (3) All intangible personal property . . . Section 1260. Subdivision 2. . . . The transfers enumerated in subdivision 1. . . . shall be taxable if made—(a) By a will . . ."

[3] Alabama General Revenue Act, approved July 10, 1935, Art. XII, c. 2 (Acts 1935, pp. 434 *et seq.*): Section 347.1: " . . . there is hereby levied and imposed upon all net estates passing by will, devise, or under the intestate laws of the State of Alabama, or otherwise, which are lawfully subject to the imposition of an estate tax by the State of Alabama, a tax equal to the full amount of State tax paid permissible when levied by and paid to the State of Alabama as a credit or deduction in computing any federal estate tax payable by such estate according to the Act of Congress in effect, on the date of the death of the decedent, taxing such estate, with respect to the items subject to taxation in Alabama. . . ." Section 347.7: " . . . all of the provisions of this Chapter shall be applicable to so much of the estates of non-resident decedents as is subject to estate tax under the Act of Congress in effect at the time of the death of decedent as consists of real estate or tangible personal property located within this State, or other item of property or interest therein lawfully subject to the imposition of an estate tax by the State of Alabama. . . ."

uses and purposes and upon terms and conditions in substance as follows: (a) She directed the trustee to pay the income to her while she lived. (b) She reserved the right by will to dispose of all the trust property. (c) She directed that if she made no disposition by will the trustee should pay $200 per month out of income to her husband during his life and the balance of income to her son and daughter during their lives; that the child or children of either, if dead, should receive the share of income which the parent would have received if living; that one-half of the property in the trust at the time of her death be transferred to the trust created for her son; and that the other half be transferred to the trust created for her daughter. (d) She reserved power at any time that she deemed income insufficient for her support to direct the trustee to sell a part of the trust property and to give her the amount received for it, and retained the right to direct transfer to her son or daughter of any portion of the trust property, and (e) the right to direct investments. She retained authority to remove the trustee and to appoint a successor. As to nearly all the property held in trust under paragraph 3, Mrs. Scales, her son, daughter, and the trustee, January 11, 1929, executed a writing releasing the power reserved to encroach on or dispose of corpus.

January 1, 1926, Mrs. Scales exerted the power by will to dispose of the trust property. Item two recites that she had reserved the right to dispose by will of property conveyed to the trustee under paragraph 3 of the trust agreement and provides: "Now, therefore, desiring to exercise the right to dispose of the said trust property, I do hereby give, devise, and bequeath all of the property in custody of said Title Guarantee Loan & Trust Company . . . at the time of my death to the said company, as trustee, the same to be held by it in trust upon the uses and trusts, terms, conditions, and limitations hereinafter set forth in this item of my will."

Section one of that item directs that from the trust estate there shall be set aside property of the value of $100,000 to be held in trust as there specified for her daughter and her daughter's children. Section two makes like provision for her son and his children. Section three directs that, after the trust property shall be set aside as specified in sections one and two, the balance in the hands of the trustee shall be given in equal shares to her daughter and son to be theirs absolutely.

An amendment to the answer of the members of the Alabama Tax Commission alleges, and by stipulation the other parties admit, that from the trust indenture it fully appears that the title, possession and control of the securities passed completely to the Birmingham trust company and that such was the status of the securities at the time of the death of Mrs. Scales. That amendment also alleges, and the stipulation admits, that she never exercised the right reserved to her to remove the trustee and that the trust property could not have been removed from Alabama except upon an order of a circuit court and in compliance with the statutes of that State.[4]

The chancery court found that at the time of the death of Mrs. Scales the securities in question "had a legal situs analogous to the situs of tangible personal property in the State of Alabama." It decreed that Alabama may legally impose upon them a death transfer or succession tax and that in so far as the inheritance tax law of Tennessee attempts to impose the tax claimed by that State it violates the due process clause of the Fourteenth Amendment.

The state supreme court reversed the chancery court. It held that the securities were not so used in Alabama as to give them a situs there; that when Mrs. Scales died the situation was the same as though there never had been a trust; and that the property passed under the will as her absolute property. It entered a decree declaring the property taxable in Tennessee and not taxable in Alabama.

The Tennessee commissioner and the members of the Alabama commission respectively claim the right to impose an inheritance or death succession tax based upon the value of all the property held in the trust at the time of the death of Mrs. Scales. Rightly the parties agreed and the state courts assumed that, consistently with the due process clause of the Fourteenth Amendment, both States may not impose transfer taxes in respect of the same property. *Frick* v. *Pennsylvania,* 268 U. S. 473, 489-494. *Farmers Loan Co.* v. *Minnesota,* 280 U. S. 204, 210-212. *Baldwin* v. *Missouri,* 281 U. S. 586, 591. *Beidler* v. *So. Car. Tax Commission,* 282 U. S. 1, 7-8. *First National Bank* v. *Maine,* 284 U. S. 312, 328. *City Bank Co.* v. *Schnader,* 293 U. S. 112, 116-117. See *Burnet* v. *Brooks,* 283 U. S. 378, 401-402; *Senior* v. *Braden,* 295 U. S. 422, 432; *Wheeling Steel Corp.* v. *Fox,* 298 U. S. 193, 209-210; *N. Y. ex rel. Whitney* v. *Graves,* 299 U. S. 366, 372; *N. Y. ex rel. Cohn* v.

[4] Alabama Code, 1928, §§ 10418-10421.

Graves, 300 U. S. 308, 314-315; *Worcester County Co.* v. *Riley,* 302 U. S. 292, 297, 298. No distinction is suggested between the securities covered by the relinquishment, January 11, 1929, of the right reserved to encroach upon and to direct transfer from the corpus and the small part to which the relinquishment did not extend. And, as the parties and the state courts have treated all alike, this Court may decide upon title and taxability as if the relinquishment covered all.

The parties agree that, upon execution of the indenture, title, possession, and control passed completely to the trustee and so continued until the death of Mrs. Scales. There being no provision authorizing revocation, the grant was irrevocable. Perry on Trusts and Trustees (7th ed.) § 104. Bogert, Trusts and Trustees, § 993. *Keyes* v. *Carleton,* 141 Mass. 45, 49. *Ewing* v. *Jones,* 130 Ind. 247, 254-255. *Savings Institution* v. *Hathorn,* 88 Me. 122, 128-129. *Wilson* v. *Anderson,* 186 Pa. 531, 537. *Hellman* v. *McWilliams,* 70 Cal. 449, 453. *Strong* v. *Weir,* 47 S. C. 307, 323. Unquestionably it presently vested full legal and equitable title in the trustee and beneficiaries, subject to be divested only by the exertion by Mrs. Scales of her power of appointment by will. *Coolidge* v. *Long,* 282 U. S. 582, 597. *Marvin* v. *Smith,* 46 N. Y. 571, 575. *Carroll* v. *Smith,* 99 Md. 653, 658 *et seq.* *Boone* v. *Davis,* 64 Miss. 133, 140. That power did not amount to an estate or interest in the trust property. *United States* v. *Field,* 255 U. S. 257, 263. *Porter* v. *Commissioner,* 288 U. S. 436, 441. All doubt as to that is precluded by the clause of the indenture which provides that in the absence of disposition by her will the property shall continue to be held in trust for purposes there specified.

The reserved authority to direct investment contemplates action as trustee and not control as owner. *Reinecke* v. *Trust Co.,* 278 U. S. 339, 346-347. The authority to remove the trustee and to appoint a successor detracts nothing from the plenary grant of title. See *Bowditch* v. *Banuelos,* 1 Gray 220, 230. When read as it must be in connection with the provisions of the Alabama statute above referred to, that provision of the indenture does not reserve power to remove the trust securities from the State of Alabama.

As the death of Mrs. Scales and taking effect of her will were coincident, the legal title remained in the trustee. The purposes Mrs. Scales intended to effect by the trusts defined by her will are

like those she intended to serve by the trusts created by the indenture which, in absence of will, were to continue after death. Stripped of mere legalism, and taken according to substance, the will operated to amend and continue the trusts created by the indenture. Questions of power to tax are governed by the substance of things rather than by technical rules, concerning title. *Tyler* v. *United States*, 281 U. S. 497, 503.

It follows that, save her right to income, Mrs. Scales, after her relinquishment, January 11, 1929, and at the time of her death, had no estate or interest in the securities held by the trustee. There is no basis for application of the fiction *mobilia sequuntur personam*. *Wachovia Trust Co.* v. *Doughton*, 272 U. S. 567, 575. *Brooke* v. *Norfolk*, 277 U. S. 27, 29. *Safe Deposit & T. Co* v. *Virginia*, 280 U. S. 83, 92, 94. *McMurtry* v. *The State*, 111 Conn. 594. *Estate of Bowditch*, 189 Cal. 377. *Matter of Canda*, 197 App. Div. 597. Cf. *Bullen* v. *Wisconsin*, 240 U. S. 625. Tennessee may not impose the inheritance tax claimed in this suit by its Commissioner of Finance and Taxation.

Moreover, if contrary to the indenture as above construed, it should be held that at the time of her death Mrs. Scales in addition to having power of appointment by will owned an interest in the trust property, Tennessee would nevertheless be without power to impose a tax on the transfer of that interest because the intangibles in question had no situs in that State.

Intangibles, like tangibles, may be so held and used outside the State of the domicil of the owner as to become taxable in the State where kept. See e.g. *New Orleans* v. *Stempel*, 175 U. S. 309. *Bristol* v. *Washington County*, 177 U. S. 133, 143 *et seq.* *Board of Assessors* v. *Comptoir National*, 191 U. S. 388. *Scottish Union & Nat. Ins. Co.* v. *Bowland*, 196 U. S. 611, 619-620. *Metropolitan Life Ins. Co.* v. *New Orleans*, 205 U. S. 395, 402. *Liverpool &c. Ins. Co.* v. *Orleans Assessors*, 221 U. S. 346, 353. The general rule of *mobilia sequuntur personam* must yield to the established fact of legal ownership, actual presence and control in a State other than that of the domicil of the owner. The phrase "business situs" as used to support jurisdiction of a State other than that of the domicil of the owner to impose taxes on intangible personal property is a metaphorical expression of vague signification; its meaning is not limited to investment or actual use as an integral part of a busi-

ness or activity, but may extend to the execution of trusts such as those created by the indenture and imposed on the trustee in this case. *DeGanay* v. *Lederer,* 250 U. S. 376, 381-382. *New York ex rel. Whitney* v. *Graves, supra,* 372 *et seq.* *Wheeling Steel Corp.* v. *Fox, supra,* 211. *First Bank Corp.* v. *Minnesota,* 301 U. S. 234.

The stock certificates, bonds or other documents evidencing the intangibles constituting the trust property were never held in Tennessee. Neither their issue or validity nor the enforcement or transfer, inter vivos or from the dead to the living, of any right attested or supported by them was at all dependent on the laws of that State.[5] From the beginning, the trust estate has been under the protection of, and necessarily the trusts have been and are being executed under, the laws of Alabama unaffected by those of any other State. See *Hutchison* v. *Ross,* 262 N. Y. 381, 394; *Sewall* v. *Wilmer,* 132 Mass. 131, 137.

At least since 1917, Mrs. Scales had no power to remove the trust or any of the trust property from Alabama. Exertion of any right or power reserved to her by the indenture was dependent on the laws of Alabama and not upon or subject to those of Tennessee, where she happened to have her domicil. *Wachovia Trust Co.* v. *Doughton, ubi supra.* Subject to the laws of Alabama, all transactions in which the trust properties were capable of being used were identified with that State. The securities, held there not only for safekeeping but as well for collection of income and principal, and subject to sale and reinvestment of proceeds, could not be more completely localized anywhere. *DeGanay* v. *Lederer, ubi supra.*

The judgment of the Supreme Court of Tennessee should be reversed and the case remanded to that court for further proceedings in accordance with this opinion.

Mr. Chief Justice HUGHES, Mr. Justice MCREYNOLDS and Mr. Justice ROBERTS join in this opinion.

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[5] See footnote 4.